

Arbitration Clause

An arbitration clause is a legal dispute settlement clause or a forum selection clause. This clause deals with the parties' rights and choices in the case of any dispute between the parties. In most arbitration clauses, the parties agree to not sue each other in a Court of Law and instead resolve their disputes through a mutual reconciliation and agreement which is achieved by a third-[party arbitrator. The Arbitrator may or may not resolve the dispute through Court like remedies such as settlement of payment and compensation.

The benefits of this clause over normal Court proceedings are many. The proceedings envisioned in this clause are more informal, are faster, require less time and costs and the remedies are chosen after discussion and reconciliation of interests, so as to keep both the parties' interests protected. Thus, these proceedings ensure a level of flexibility unattainable by normal Court proceedings that require strict adherence to protocol and fixed remedies in fixed situations. The parties in Arbitration can convene according to convenience of both and do not require fixed dates and applications.

The remedies in Arbitration are made to fit the problem at hand to reconcile the parties and on the other hand, the remedies in a Court proceeding are fixed and applied to the problem based on some set guidelines.

The Arbitration clauses may be binding or non-binding. The Binding clauses are those that are final and binding and are enforced by Courts. These cannot be appealed against unless the Arbitrator was unfair or biased while deciding and thus, violated a public policy.

A Non-binding arbitration clause allows parties to freely reject the Arbitrator's decision and take the dispute to court to make a final determination, if the parties are not content with the decision or the procedure of the Arbitrator. However, more often than not, parties agree on Binding arbitration clauses since they tend to be more conclusive and ensure a fast and quick decision.

Arbitration is different from mediation as it is not binding on the parties and the mediator does not hear evidence. The mediator tries to resolve the dispute through discussing and caucusing and it does not really resemble a legal proceeding¹.

The procedure for Arbitration entails that the disputing parties approach a disinterested and unbiased third party for resolution. This third party hears the arguments and evidence brought forth by the parties and encourages discussion, after which s/he may come to a decision which reconciles the interests of the parties and choose remedies in the interest of that object.

Arbitration is a form of Alternate Dispute Resolution (ADR) which means that it is an alternative to traditional legislation and thus, saves time and cost sent in Court Proceedings and aims to

¹ Jean Murray, *Learn How the Arbitration Process Works*,
<https://www.thebalancesmb.com/what-is-the-arbitration-process-how-does-arbitration-work-397420>.

resolve the dispute without burdening the parties with the Court formalities and without burdening the Court with a plethora of matters, in the interest of speedy justice and quick disposal.

In USA, the American Arbitration Association (AAA) has laid down a procedure for Arbitration. In India, Arbitration and Conciliation Act, 1996 governs the procedure. It states that, a party can commence arbitration by issuing a notice in writing to the other party of its intention to refer the dispute to arbitration. Unless otherwise agreed by the parties, arbitration proceedings are deemed to have commenced on the date on which the respondent receives such notice from the claimant. The parties have the freedom to agree on the procedure for conducting the arbitration proceedings. If no such procedure is agreed by the parties, the tribunal is authorized to conduct the proceedings in such manner as it considers appropriate. The tribunal is expressly exempt from applying the provisions of the Civil Procedure Code 1908 and the Evidence Act 1872. If, under the arbitration agreement, the arbitration is to be administered by an arbitration institution, the rules of that institution become a part of the arbitration clause by implication².

The parties can also agree on language and location, but if there is no such agreement, the Tribunal may decide these. The parties may also agree on rules of gathering and admission of evidence, however, if there is no agreement the Tribunal may exercise discretion. The Tribunal may admit documentary or oral evidence.

The UNCITRAL Model Law on International Commercial Arbitration 1985 is the basis for the Arbitration Act. However, the recent amendment to the Arbitration Act departs from UNCITRAL Model Law and is an attempt to deal with some of the lacunae which were found in the operation of the law.

The Arbitration and Conciliation (Amendment) Act has inserted amendments into the Arbitration Act that require the tribunal to, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on a day-to-day basis, and not grant adjournments unless sufficient cause is provided. The tribunal may impose exemplary costs on the party seeking frivolous adjournments.³ Thereby, ensuring speedy disposal and adherence to principles of Natural Justice.

Dissenting arbitrators are allowed in Arbitration procedures and can give a separate award or can give separate opinion in the same document. However, as this is not a part of majority decision it is not enforceable. Local Courts are also permitted to intervene in the proceedings and thus, they also have the power to issue interim orders, order evidence to be produced directly to the tribunal and to even appoint arbitrators, if the parties have trouble appointing one⁴.

² White and Case LLP, *Arbitral proceedings in India*,
<https://www.lexology.com/library/detail.aspx?g=137061bc-e438-42dd-b184-d0ab17ac68cd>.

³ *Supra*

⁴ *Supra*

Thus, the arbitration clause must include all these points if the parties want to exercise their discretion on these matters. The Clause must be clear and non-arbitrary to guarantee a fair proceeding without any scope for misinterpretation.

An arbitration clause may have the following forms:

- i. Every dispute, difference, or question which may at any time arise between the parties hereto or any person claiming under them, touching or arising out of or in respect of this agreement (deed) or the subject matter thereof shall be referred to the arbitration of XY, etc. or if he shall be unable or unwilling to act, to another arbitrator to be agreed upon between the parties or failing agreement to be nominated by.....or, failing agreement to two arbitrators one to be appointed by each party to the difference (whether consisting of one or more than one person) and in case of difference of opinion between them to an umpire appointed by the said two arbitrators before entering on the reference and the decision of the arbitrator (or such arbitrators, or umpire as the case may be) shall be final and binding on the parties.

OR

- ii. In the event of any dispute, difference or question arising out of or in respect of this agreement or the commission of any breach of any terms thereof or of compensation payable thereof or in any manner whatsoever in connection with it, the same shall be referred to the Chamber of Commerce.....(or the Association of.....) for arbitration as provided in Rules framed by the said Chamber (or Association) for the purpose. The decision or award so given shall be binding on the parties hereto.⁵

Arbitrations in India are either Ad hoc or Institutional arbitrations.

Usually, large commercial disputes in India tend to be settled by Ad hoc arbitrations with the Arbitration Act as the governing legislation. This means that there is no institutional interference and the parties make the arrangements for the arbitration themselves, and have the discretion to choose the rules, applicable laws, procedures and administrative support. However, some parties also opt for dispute resolution under the rules of a particular arbitration institution. Some of the popular arbitration institutions include the:

- International Chambers of Commerce (ICC).
- London Court of International Arbitration (LCIA).
- Singapore International Arbitration Centre (SIAC).

⁵ *FORM OF ARBITRATION CLAUSE IN AN AGREEMENT*,
<http://www.legalserviceindia.com/arbitration/Arbitration9.html>

Indian arbitration institutions include the Delhi International Arbitration Centre, Indian Council of Arbitration, Construction Industry Arbitration Council (CIAC), Indian Council of Arbitration (ICA) etc.⁶

Judicial Dicta has further refined the law on Arbitration Clauses. In *Enercon (India) Ltd. v. Enercon GmbH & Anr.*⁷, the Supreme Court pronounced judgment on the question of whether an arbitration clause being a part of an Agreement/contract which is not concluded is a valid arbitration agreement. The Court stated that this clause would be independent of the principal contract and also elucidated that the concept of severability from the principal contract is a necessity so that the intention of the clause, which is the parties want to solve their disputes by arbitration, must not be lost on the account of breach or voidability of the underlying contract.

In *Ashapura Mine-Chem Ltd. V. Gujarat Mineral Development Corporation*⁸, the Apex Court reiterated this principle and stated that the Arbitration Clause would be severable from an MoU and even if the MoU is terminated the Arbitration clause would continue to exist.

Consensus ad idem was laid down in *Rickners Verwaltung GmbH v. Indian Oil Corporation*⁹ where the Court held that the intention of the parties could only be deciphered from expressions used and the meaning they convey.

In *M. Dayanand Reddy v. A.P. Industrial Infrastructure Corp. Ltd. & Ors.*¹⁰, it was held that the Arbitration Clause need not be in a particular form as long as the intention for arbitration was clear. Thus, no specific words need to be present for the clause to be valid.

Thus, we can conclude by saying that Arbitration is an important aspect of the legal system and is becoming more relevant in the new age because of the lack of time and patience and for the ones seeking flexible and amiable proceedings without formalities, for the benefit of both parties. An Arbitration Clause in an agreement makes sure that the parties do not sue each other and go for Arbitration to resolve their disputes. The Arbitration Clause has existence separate from that of the agreement and is not bound to be in any specific form as long as it conveys the mutual intention of the parties.

⁶ Sameer Parekh, Arbitration procedures and practice in India: overview, [https://content.next.westlaw.com/Document/I8abc648d1c9a11e38578f7ccc38dcbee/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default&firstPage=true&bhcp=1](https://content.next.westlaw.com/Document/I8abc648d1c9a11e38578f7ccc38dcbee/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1).

⁷ (2014) SLT 470

⁸ 2015(5) SCALE 379

⁹ (1999) 1 SCC 1

¹⁰ (1993) 3 SCC 137

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